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Fundamental rights in the future of the European Union's Justice and Home Affairs

Executive Summary

Background

The European Commission launched in late 2013 two public consultations on the future of the Justice and Home Affairs within the European Union (EU). One is entitled [Debate on the future of Home Affairs policies: An open and safe Europe – what next?](#) and organised by the Directorate General Home Affairs. The other one is built around the conference [Shaping Justice policies in Europe for the years to come](#) organised by the Directorate General Justice on 21 and 22 November 2013. The results of the two consultations are to feed into the discussion on the future development of the justice and home affairs area. In order to provide advice in this context, the European Union Agency for Fundamental Rights (FRA) submitted (in late December 2013 and early January 2014 respectively to the two processes) a contribution that addresses both the areas of justice and of home affairs. FRA also submitted a specific paper to the November conference mentioned above. The submission of the FRA signals that fundamental rights are cross-cutting concerns and underlines that EU institutions have an obligation to take them into account in the development of all legislation and policies.

In 2009, FRA commented on the then upcoming Stockholm programme,¹ underlining that the programme can only be a first step in guaranteeing that the so-called ‘third pillar’ of the EU is watertight with regard to fundamental rights. As the 2009 FRA paper noted: “What will be even more important for Europe’s fundamental rights culture is the implementation and evaluation of the Programme in the years to come.”² Four years on, FRA therefore took a look back at the ‘Stockholm-period’ and is proposing the following considerations for the short- and medium-term future – structured in relation to the overall framework, the area of Justice and the area of Home Affairs.

Considerations for strengthening the overall framework

The entry into force of the Charter of Fundamental Rights of the European Union in December 2009 enhanced awareness of fundamental rights obligations in the EU. Four years later it appears important to guarantee that these obligations are reflected throughout all EU legislation and policies – not the least in the area of justice and home affairs. This can be achieved through:

¹ OJ C115 of 4 May 2010, pp. 1–38.

² FRA (2009), *The Stockholm Programme: A chance to put fundamental rights protection right in the centre of the European Agenda*, available at: http://fra.europa.eu/sites/default/files/fra_uploads/538-FRA-comments-on-Stockholm-Programme.pdf.

- An EU legislator who pays close attention to the horizontal obligation to ‘respect, observe and promote’ fundamental rights. Equally important is that fundamental rights are taken into account at all stages of the transposition and implementation of EU law at national level. Moreover, in order to ensure that laws do not remain on paper, but are also effective in practice, it is essential that people are adequately informed about their rights arising under the legislation.
- A ‘joined up’ response amongst all relevant actors tasked with the protection and promotion of fundamental rights so that relevant institutions and procedures are interlinked at international, European, national and local levels of governance.
- A high level of trust between Member States in order to allow for the functioning of a system that relies largely on mutual recognition without compromising the primary obligation to respect and protect fundamental rights.

FRA hereby proposes various elements for consideration, including the establishment of an EU internal ‘fundamental rights strategy’, a ‘fundamental rights policy cycle’, the establishment of a ‘European fundamental rights information system’, new formats of joined up coordination both at EU level, bringing together, for instance, national parliamentary committees with the European Parliamentary Committee on Civil Liberties, Justice and Home Affairs (LIBE) and EU expert bodies, as well as at national level, by linking, for instance, civil society with national fundamental rights actors in ‘national fundamental rights platforms’.

Considerations for the area of Justice

EU justice programmes have increasingly come to specify that particular actions be taken, and the Stockholm programme requires a number of legislative initiatives during its five-year period. There seems to be strong support for a post-Stockholm period in the area of justice that focuses on ensuring that the legislation in place is effective and well-functioning. As with home affairs, justice needs to devote special attention to fundamental rights – not only because of the obligations undertaken in and of themselves but also to ensure mutual trust between Member States and the system’s credibility among users. This attention should include improved and adapted access to justice, independence criteria for national bodies with a human rights remit, improved criminal procedures and enhanced rights of victims of crime as well as a range of measures to further equality. In parallel with the area of home affairs, greater emphasis needs to be placed on the application of fundamental-rights compliant justice in practice, which would require closer and regular scrutiny of how the law is applied on the ground.

Consideration for the area of Home Affairs

The last decade was characterised by intensive law making. To date, over 30 regulations and 20 directives were adopted in the field of home affairs. Several of them were amended, some more than once. Within this body of new and amended legislation – as in the area of justice, more attention needs to be given to the fundamental-rights compliant application of EU law. EU and Council of Europe standards on fundamental and human rights, which are woven into the fabric of EU law, need to be applied in practice. Border guards, consular officials, immigration and asylum officers, as well as other persons taking decisions affecting individuals on a daily basis need simple and practical tools to help them in their roles. There are also some broader issues which the EU is confronted with and which should be looked into in the mid-term. These are listed in the sections in this paper on visa and borders, asylum, and immigration and return.

Strengthening the framework for ‘respecting, observing and promoting’ fundamental rights

The Stockholm Programme provided new momentum for an intensive law-making period. Some of the legislation adopted under the programme also aimed at addressing fundamental rights problems. The law in and of itself does not, however, automatically change what happens in practice, as implementation reports by the European Commission, FRA publications and other studies show. Against this background it is time to assess the *acquis* and its impact on fundamental rights, and to build on such an evaluation for further follow-up to the Stockholm Programme.

From a fundamental rights perspective, the implementation of legislation can be improved by taking the following considerations into account:

- First, the EU legislator must pay close attention to the horizontal obligations so that EU legislation respects, protects and promotes fundamental rights. Legislation that is both understood by those to whom it is addressed and its intended beneficiaries, and that is perceived as legitimate, will be better implemented. Taking fundamental rights into account at all stages of law-making and enforcement and ensuring that people are adequately informed about the rights arising under the legislation is essential to ensure that laws do not remain on paper, but are also effective in practice.
- Second, when implementing the law all fundamental rights actors (see below) must work together, in a ‘joined up’ spirit that aims at achieving shared objectives while optimising the potential for synergies.³
- Third, it is essential that a high level of trust is maintained and further enhanced between Member States in order to allow for the functioning of a system that relies largely on mutual recognition, rather than on harmonisation or the approximation of laws.

1. Paying close attention to horizontal obligations

The EU Charter of Fundamental Rights is a general catalogue of horizontal obligations, which the European Commission, Council of the European Union and European Parliament must comply with when legislating.⁴ This is not necessarily the case as can be seen from the occasional critique raised against adopted or proposed EU legislation.⁵ Even where legislation is ‘fundamental rights-proof’, in other words in compliance with fundamental rights, it does not necessarily translate into rights being invoked and upheld. Low awareness of rights, with the public in general as well as with governmental

³ See FRA (2013), *Joining up fundamental rights. Toolkit for local, regional and national public officials*, available at: <http://fra.europa.eu/en/joinedup/home>; see also FRA (2012), *Bringing rights to life: The fundamental rights landscape of the European Union*, Luxembourg, Publications Office of the European Union, available at: <http://fra.europa.eu/en/publication/2012/bringing-rights-life-fundamental-rights-landscape-european-union>.

⁴ Article 51 (1) of the Charter entails three different dimensions, namely to “[...] respect the rights, observe the principles and promote the application thereof [...]”. Cf. the standard UN formula of ‘respect, protect, fulfil’. The Charter makes reference to respect and protect, for example in Article 1 (human dignity).

⁵ For an example on adopted legislation see the recent opinion of Advocate General Villalón who took the view that the Data Retention Directive is as a whole incompatible with the requirement, laid down by the Charter, that any limitation on the exercise of a fundamental right must be provided for by law: opinion in Joined Cases C-293/12 *Digital Rights Ireland* and C-594/12 *Seitlinger and Others* of 12 December 2013. For an example on proposed legislation, see FRA Opinion 01/2012 on proposed EU regulation on property consequences of registered partnerships, available at: <http://fra.europa.eu/en/opinion/2012/fra-opinion-proposed-eu-regulation-property-consequences-registered-partnerships>.

officials at various levels, and inadequate implementation can be major barriers to ensuring that rights become a reality for the citizen. Clear and understandable legislation helps guarantee that laws are accessible to the public they serve. This remains a challenge, since EU law, often the result of compromises achieved after long negotiations, is sometimes vague or ambiguous, or contains broad scope for exceptions or derogation at national level. The Court of Justice of the EU (CJEU) has issued, for example, over 20 rulings since 2009 clarifying provisions of the EU asylum *acquis* alone.⁶

Ensure that the EU legislator conforms to horizontal obligations

- Current mechanisms within EU institutions to assess the fundamental rights impacts and/or the compatibility with human rights standards of forthcoming EU legislation could be screened to check whether there is potential for improvement. Such a screening exercise could look into the practical application of mechanisms that have been designed in this regard, such as the European Parliament's Rule 36,⁷ the Council's Guidelines,⁸ the European Commission's strategy,⁹ or the possibility for the institutions to request an opinion from the Fundamental Rights Agency.¹⁰ It could also explore avenues to ensure involvement of external expertise where doubts on Charter-compatibility arise.
- In addition to the Charter, the EU legislator must also respect other horizontal obligations laid down by the treaties. Some of these obligations go beyond merely avoiding infringements of fundamental rights; they require the EU legislator to actively promote certain fundamental rights in the context of all EU policies, as, for example, Articles 8 to 11 of the Treaty of the Functioning of the European Union (TFEU) on the equality between women and men or the fight against discrimination. With some years since the entry into force of the Lisbon Treaty being, it might be worthwhile to assess how the EU legislator has delivered on this transversal fundamental rights mandate.

Increase rights awareness amongst rights holders within the EU

- Data collected by FRA, as well as Eurobarometer surveys, show that rights awareness tends to be very low among both the general population, as well as minority groups. In the case of equality legislation, for example, almost 60 % of 23,500 immigrants and ethnic minorities interviewed by FRA “were either unaware or unsure about the existence of legislation covering [...] non-discrimination on the basis of racial or ethnic origin.”¹¹ In relation to equality legislation, such low rates of rights awareness are especially striking since the obligation to make rights known is made explicit in the relevant EU directives.¹² Against this

⁶ For an overview, see FRA (2013), *Fundamental rights: challenges and achievements in 2012*, Luxembourg, Publications Office of the European Union, available at: http://fra.europa.eu/sites/default/files/fra-2013-safeguarding-fundamental-rights-in-crisis_en.pdf, Annual report 2012, Chapter 1. Some of the cases listed as pending have since been decided.

⁷ See: [Rule 36](#) on the “respect for the Charter of Fundamental Rights of the European Union”.

⁸ See [Guidelines](#) on methodological steps to be taken to check fundamental rights compatibility in the Council's preparatory bodies.

⁹ COM(2010) 573 final, of 19 October 2010.

¹⁰ Article 4 (1) (d) and (2) of Council Regulation No. 168/2007 establishing the European Union Agency for Fundamental Rights, OJ L 53 of 22 February 2007, p. 1.

¹¹ FRA (2010), *Data in Focus 3: Rights awareness and equality bodies*, Strengthening the fundamental rights architecture in the EU III, Luxembourg, Publications Office of the European Union, p. 3, available at: http://fra.europa.eu/sites/default/files/fra_uploads/854-EU-MIDIS_RIGHTS_AWARENESS_EN.PDF.

¹² EU Member are tasked to “take care that the provisions adopted pursuant to this Directive, together with the relevant provisions already in force, are brought to the attention of the persons concerned by all appropriate means throughout their territory”. See Art. 10 of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial and ethnic origin, OJ 2000 L180 (*Racial Equality Directive*) or Article 12 of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, OJ 2000 L 303 (*Employment Equality Directive*).

background, the EU and especially its Member States must revamp their efforts to better target their awareness-raising efforts.

- Even where people show greater awareness of fundamental rights, this does not necessarily translate into higher rates of reporting discrimination. The recent FRA survey on Jewish people's experiences and perceptions of antisemitism showed, for example, a relatively high rate of rights awareness among the Jewish respondents in the eight EU Member States covered by the survey, while rates of reporting discrimination and antisemitic incidents remained low. Some 64 % of the survey respondents who said that they had experienced antisemitic violence, did not report the most serious antisemitic physical violence they had experienced in the past five years, and 76 % did not report the most serious antisemitic harassment they had experienced in that period. When asked why they did not report the incident, 47 % said because "nothing would happen or change".¹³ These findings illustrate that it is essential to invest, both politically and in terms of resources, in enhancing trust in law enforcement and criminal as well as administrative and judicial procedures at national level. While fully respecting the principle of subsidiarity, the EU could therefore consider developing effective EU-wide awareness-raising campaigns in coordination with national actors, including government, national parliaments and civil society, on legislation that directly impacts on fundamental rights.

2. A joined-up approach to fundamental rights in the EU

Fundamental rights issues are a shared responsibility across governmental levels and sectors. They are at the heart of almost every aspect of public sector work. If the tasks of each sector or level are disconnected from one another, however, there is a risk that some individuals, and/or some rights, end up outside anyone's responsibility. Given the relationship within justice and home affairs to sensitive issues such as national security, any such disconnect may be even greater. In this light, FRA research underlined that the 'fundamental rights landscape' – meaning the plethora of different institutions and procedures at international, European, national and local levels tasked with the protection of fundamental rights – should better coordinate their response to fundamental rights, ensuring that the various components work well together without leaving gaps in rights protection.¹⁴

Increase effectiveness by enhancing cooperation and coordination between and at local, regional and national levels

Cooperation between different bodies contributes to the effectiveness of the rights enshrined in the Charter.¹⁵ There is not so much a need to establish new mechanisms and procedures. Instead, to make

¹³ FRA (2013), *Discrimination and hate crime against Jews in EU Member States: experiences and perceptions of antisemitism*, Luxembourg, Publications Office of the European Union, available at: http://fra.europa.eu/sites/default/files/fra-2013-discrimination-hate-crime-against-jews-eu-member-states_en.pdf, Figure 25, p. 51. FRA's EU LGBT online survey of 93,079 persons found that of those respondents who in the last year had felt personally discriminated against at work or when looking for a job, in education, healthcare or social services or when accessing any of the goods and services covered by the survey because of being LGBT, just one in 10 (10 %) had reported to the authorities the most recent incident of discrimination that they had experienced. See FRA (2013), *European Union lesbian, gay, bisexual and transgender survey*, Luxembourg, Publications Office of the European Union, available at: http://fra.europa.eu/sites/default/files/fra-2013-discrimination-hate-crime-against-jews-eu-member-states_en.pdf.

¹⁴ FRA (2013), *Joined-up governance: connecting fundamental rights*, Online toolkit, available at: <http://fra.europa.eu/en/joinedup/home>.

¹⁵ FRA (2012), *Bringing rights to life: the fundamental rights landscape of the European Union*, Luxembourg, Publications Office of the European Union, available at: http://fra.europa.eu/sites/default/files/fra_uploads/2230-FRA-2012_annual-report-2011-fundamental-rights-landscape_EN.pdf; FRA (2010), *National Human Rights Institutions in the EU Member States*,

good use of the resources available, existing channels and forums for regular exchanges and the creation of synergies between existing structures should be developed further. Such increased levels of cooperation and coordination are particularly important in countries organised in a federal structure, in which the implementation of fundamental rights falls under the competences of different levels of authorities.

- At national level, authorities like Ombudsperson institutions, National Human Rights Institutions (NHRIs), committees within national Parliaments dealing with fundamental rights issues as well as local authorities that are closest to the citizens could develop more concrete synergies, for example by setting up formal and/or informal fundamental rights networks.
- Establishing and monitoring national actions plans in the area of fundamental rights protection, as the Netherlands and Finland have recently done, could form useful frameworks for such an enhanced commitment to horizontal cooperation at national level.
- Civil society is a crucial stakeholder in the field of fundamental rights protection. Building on FRA's experience with its own 'Fundamental Rights Platform',¹⁶ which brings together over 400 civil society organisation representatives in a structured dialogue, one could look into the possibility of establishing comparable platforms at national level. Broad representation would allow key civil society actors to meet regularly, exchange experiences and best practices and formulate proposals for the improvement and implementation of policies. Indeed, the shaping of fundamental rights policies through participation of various segments of society is one of the key concerns of the Paris Principles on national institutions for the promotion and protection of human rights.

Increase effectiveness by enhancing cooperation and coordination between and at national and EU levels

Within EU institutions, the entry into force of the Charter of Fundamental Rights has increased the commitment to fundamental rights. To further operationalise this commitment, all relevant EU bodies could set up a regular, coordinated exchange of information that would allow for the complementary, timely and well-designed advice to the European Commission, the Council of the European Union and the European Parliament.

- Given the increased role of national parliaments post-Lisbon, it would be worthwhile exploring whether the national parliamentary committees that deal with fundamental rights could be brought together in an EU-wide network.¹⁷
- Permanent coordination between all stakeholders could be complemented by an annual coordination meeting bringing together representatives from the relevant EU legislators' formations (LIBE Committee of the European Parliament, FREMP Working group of the Council, responsible directorates in the European Commission) with the national parliamentary committees dealing with fundamental rights as well as with independent EU expert bodies like the FRA, the EDPS, the Ombudsman and EU-level umbrella organisations representing national equality bodies (Equinet), NHRIs (the European Network of NHRIs) and ombuds institutions (The European Network of Ombudsmen).
- Such a fundamental rights coordination meeting would ideally take place before the European Commission finalises its annual work programme in order to guarantee that its input feeds into legislative and policy planning at EU level. This exercise should also allow for an

Strengthening the fundamental rights architecture in the EU I, Luxembourg, Publications Office of the European Union, available at: http://fra.europa.eu/sites/default/files/fra_uploads/816-NHRI_en.pdf.

¹⁶ For more information, see the FRA website: <http://fra.europa.eu/en/cooperation/civil-society>.

¹⁷ A comparable structure exists for Parliamentary Committees dealing with EU integration (the Conference of Parliamentary Committees for Union Affairs of Parliaments of the EU).

assessment of the past year so that those attending can provide feedback. This would de facto allow for a ‘fundamental rights policy cycle’ which would collectively look at the various activities of all actors in the field. It would help ensure that national experiences feed into EU-level policy developments and, vice-versa, that EU-level developments are implemented on the ground.¹⁸

- Such a ‘fundamental rights policy cycle’ could, in combination with enhanced channels of coordination and cooperation, form the basis of what could become a comprehensive internal strategic framework for fundamental rights. Such a strategic framework could be the equivalent, in internal EU law- and policy-making, of the framework and action plan that guide its external human rights policies, illustrating clearly that the EU practices at home what it projects to the outside world.¹⁹

3. Increasing mutual trust across national borders and legal cultures

Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.²⁰ In the area of Freedom, Security and Justice this principle of loyal cooperation finds specific expression in the principle of mutual recognition which works on the basis of trust between Member States. Given what should be the prominent position of fundamental rights, mutual recognition should not lead to a situation where fundamental rights are left unguarded. To the contrary, mutual trust is premised on fundamental rights, and strengthening rights cements it further.

Guarantee that mutual recognition is fundamental rights-compliant and ‘workable’ for practitioners

- There are variations within the EU as regards the fulfilment of fundamental rights standards. Such variations extend to the protection of absolute rights such as conditions of detention.²¹ All Member States are obliged to comply with fundamental rights in the implementation of EU law; nonetheless, the presumption that they have complied, which forms the basis of mutual trust, is rebuttable. As the CJEU confirmed in the context of asylum law: “European Union law precludes the application of a conclusive presumption that the [responsible] Member State [...] observes the fundamental rights of the European Union.”²²
- Though compliance with fundamental rights is required in all cases, different legal traditions should not jeopardise mutual trust. Mutual trust can be enhanced by fostering transnational contacts. National judges and other law enforcement agencies should be trained to make certain that, in cooperating with their counterparts from other EU Member States, they take into account their duty under EU law to ensure that no decision implementing EU law violates either substantive standards or procedural rights that are embodied in the EU Charter of

¹⁸ The fundamental rights policy cycle could also be formalised. It could, for instance, be adopted by the Council of the EU based on a European Commission recommendation with the appropriate European Parliament involvement. In any event, such a policy instrument should take fully into account the existing allocation of competences between the EU and the Member States, while also improving coordination and complementarity between the different levels at which fundamental rights are implemented.

¹⁹ Council of the European Union (2012), EU Strategic Framework and Action plan on Human rights and Democracy, adopted in June 2012, available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf.

²⁰ See Art. 4 (3) TEU.

²¹ Compare the annual report of the European Committee for the Prevention of Torture (CPT); see Council of Europe (2013), *23rd General report of the CPT*, Strasbourg, Council of Europe, available at: <http://cpt.coe.int/en/annual/rep-23.pdf>.

²² CJEU, Joined Cases C-411/10 and C-493/10, *N.S. v. Secretary of State for the Home Department and M.E. and Others v. Refugee Applications Commissioner & Minister for Justice, Equality and Law Reform*, 21 December 2011, para. 105.

Fundamental Rights or in the general principles of EU law. To underpin such measures, the EU should provide sufficient funds for the relevant EU funding schemes.

- The EU could also provide funds for the creation of a database that would bring together all the information needed to make an informed assessment of a given country's fundamental rights situation. Such a 'European fundamental rights information system' could form a one-stop-shop bringing together the wealth of data that already exists but remains spread over a plethora of sources. Indeed, considerable information is available on the fundamental rights performance of the 28 EU Member States; most of it is not, however, at the 'fingertips' of actors who are tasked with looking at the situation of fundamental rights in specific fields at the national and international level. The creation of a European fundamental rights information system would form a hub, bringing together, in an accessible manner, existing information from the United Nations (UN, mainly from the treaty bodies, and also from special procedures and the UN Universal Periodic Review), the Council of Europe (monitoring mechanisms and expert bodies), the Organization for Security and Co-operation in Europe, the EU (data from the European Commission, including Eurostat; FRA; Council working parties like GenVal and ScheVal; as well as possibly the European Ombudsman; and the Petitions Committee of the European Parliament (PETI)). Such a system would enhance transparency and objectivity and increase awareness about international standards, especially those of the Council of Europe in the EU context. Such a system could also be drawn on to 'populate' fundamental rights indicators with actual data concerning fundamental rights compliance, which would assist users in assessing the situation in Member States. Reliance on such an information system should not, of course, be a substitute for the case-by-case assessment required in the practical application of mutual recognition, since each individual case a national authority is confronted with may present very specific particularities.

Guarantee that experiences, practices and approaches are regularly exchanged across borders in a spirit of a shared 'fundamental rights culture'

- The EU and its Member States should approach the revamping of their shared 'fundamental rights culture' by exchanging promising practices through more and better structured multilateral and bilateral contacts. Such a culture would perceive constructive critique as a natural part of a shared desire to pool forces and experiences in order to raise the bar in the area of fundamental rights protection. To give just one example: the European e-justice portal could become a suitable access point for promising practices on how best to live up to EU standards on justice.²³ It could, for instance, offer a search function of vetted practices. FRA initiated a modest attempt in this regard with an online toolkit for public officials, which includes 'examples' under various headings on to how to better 'join up' fundamental rights.²⁴ Simple and practical tools are needed to ensure that fundamental rights standards are upheld in practice. The identification of such practical tools is again to be based on an open exchange of experiences. To give an example from the area of home affairs: Member States' experts and the European Commission in collaboration with FRA developed concrete practical guidance on apprehension practices in the form of 'do's and don'ts' for immigration law enforcement officials. Practical support to mainstream fundamental rights at the operational level should be a priority for the allocation of funds (for instance under the future Internal Security Fund and Asylum and Migration Fund).
- A regular exchange against the background of a shared fundamental rights culture would also be required in the judiciary. According to FRA data, some of the Charter articles such as Article 47 (right to an effective remedy and a fair trial), Article 52 (scope and interpretation of rights and principles) and Article 51 (field of application) are often referred to before national

²³ Available at: <https://e-justice.europa.eu/home.do?action=home&plang=en>.

²⁴ Available at: <http://fra.europa.eu/en/joinedup/home>, see 'examples', for instance, at: <http://fra.europa.eu/en/joinedup/tools/communicating-fundamental-rights/engaging-public/champions>.

courts.²⁵ It appears, however, that national courts do not analyse in-depth whether the facts of a case fall within the scope of EU law. A considerable number of national judgments that quote the Charter concern cases that clearly fall outside the Charter's scope. To rectify this, judges and quasi-judicial body members should enhance their exchange of experiences concerning the Charter. Such an exchange will gradually improve national courts' understanding of the conditions under which the Charter of Fundamental Rights should be invoked and reduce any dissatisfaction that might arise, for instance, through inadmissible references for preliminary rulings from the CJEU. Training modules and a general guide on the scope of the Charter might also be helpful instruments.²⁶ FRA has developed a series of Handbooks²⁷ on CJEU and ECtHR case law in targeted areas. Additional handbooks could be prepared to raise awareness among legal practitioners about the scope of the Charter's safeguards. The European fundamental rights information system, proposed above, could also cover national case law referring to the Charter as well as the role of the Charter before non-judicial bodies, thereby providing evidence of how the Charter is de facto used at national level.

Establish a practice of peer-monitoring and peer-evaluation with a contribution from the European Commission and expert bodies

- A true fundamental rights culture requires that the application of relevant legislation is regularly and independently monitored. Schengen evaluations covering sea borders should, for example, review, as part of their overall assessment, whether instructions and training provided to law enforcement officers patrolling sea borders adequately address fundamental rights and in particular the principle of *non-refoulement*. To this end, evaluators should be provided with appropriate guidance and training on fundamental rights. *Ex post* evaluation of legislation is especially useful when seen in combination with the establishment of a fundamental rights policy cycle that allows for the assessment to feed into the reform of EU legislation and policies.
- In order to provide for a general evaluation format across all justice and home affairs policies, the European Commission could submit a proposal according to Article 70 of the TFEU, "laying down the arrangements whereby Member States, in collaboration with the Commission, conduct objective and impartial evaluation of the implementation of the Union policies". The results of such an evaluation mechanism, which would also involve input from independent expert bodies and civil society organisations, should be reported back to the European and national parliaments and feed directly into the fundamental rights policy-cycle.

²⁵ In 2012, FRA looked into 240 judgments from national courts in 17 EU Member States that quoted the EU Charter for Fundamental Rights. Almost half referred to Article 47 (access to justice) while nearly a quarter referred to Articles 51 or 52 (general provisions, related to the field of application and scope of the Charter).

²⁶ FRA (2012), *Copenhagen Seminar Report Danish Presidency of the Council of the EU and EU Agency for Fundamental Rights*, available at: <http://fra.europa.eu/sites/default/files/copenhagen-seminar-report.pdf>.

²⁷ See e.g. *Handbook on European law relating to asylum, borders and immigration*, Luxembourg, Publications Office of the European Union, available (in several languages) at: <http://fra.europa.eu/en/publication/2013/handbook-european-law-relating-asylum-borders-and-immigration>.

Considerations for the area of Justice

1. Access to justice

Lower thresholds, boost access and increase effectiveness

Access to justice, a right in itself, enables the claiming of other rights. A broad reading of this right spans not only access to courts, but non-judicial mechanisms and even (see above) the knowledge of rights and where to turn to access them. Procedures for making such rights a reality are mainly in the hands of the EU Member States. They must ensure that procedures allow for an efficient and non-discriminatory access to all rights that EU law guarantees. Studies by FRA, however, point to a number of concerns in accessing justice in the EU.

- In many EU Member States, access to justice suffers from the length of proceedings and from austerity measures that risk affecting vulnerable groups disproportionately. Member States should therefore consider, among other measures, the expansion of e-Justice. Care should be taken, however, when replacing more traditional forms of accessing justice with e-Justice systems to avoid rendering access to justice dependent on internet access.²⁸
- Accessing justice is obstructed by a number of factors. To overcome the main obstacles, Member States should: provide legal aid in an accessible way for all legitimate cases; keep court fees at a reasonable level; avoid setting unnecessarily short time limits for submitting claims; address effectively the length of proceedings; accept international monitoring mechanisms, in particular those that allow for individual complaints.²⁹ The EU can also support and encourage these developments.
- When considering improvements in access to justice, the EU and its Member States should also keep non-judicial and quasi-judicial bodies in mind. NHRIs should be appointed or established in all EU Member States with a view to their full accreditation (A status) under the so-called Paris Principles.³⁰ The EU could establish or promote similar minimum standards for independence and effectiveness of other bodies with a human rights remit, in particular those required under EU law, such as equality bodies or data protection authorities (see also below). The standards for these are not clearly expressed in EU law but recent jurisprudence from the CJEU points to shortcomings in the independence of data protection authorities.³¹

Adapt access to justice to specific circumstances:

- In cases of discrimination, three problem areas in accessing justice can be identified, related to structures, procedures and support. In relation to structures, Member States should reduce

²⁸ FRA (2013), *Fundamental rights: challenges and achievements in 2012*, Luxembourg, Publications Office of the European Union, available at: http://fra.europa.eu/sites/default/files/annual-report-2012-chapter-8_en.pdf, Annual Report 2012, Chapter 8.

²⁹ FRA (2011), *Access to justice in Europe: an overview of challenges and opportunities*, Luxembourg, Publications Office of the European Union, available at: http://fra.europa.eu/sites/default/files/fra_uploads/1520-report-access-to-justice_EN.pdf.

³⁰ Principles relating to the status and functioning of national institutions for the promotion and protection of human rights, UN Res. A/RES/48/134, 20 December 1993. On the present extent of accredited NHRIs in the EU Member States, see FRA's Annual report 2012: FRA (2013), *Fundamental rights: challenges and achievements in 2012*, Luxembourg, Publications Office of the European Union, p. 300, available at: http://fra.europa.eu/sites/default/files/annual-report-2012-chapter-10_en.pdf.

³¹ CJEU, *Commission v. Germany*, C-518/07, 9 March 2010 and *Commission v. Austria*, C-614/10, 16 October 2012. See also the Advocate General's Conclusions, *Commission v. Hungary*, C-288/12, 10 December 2013.

the complexity of legislation and mechanisms while improving accessibility in terms of outreach and online availability. Some procedures also need to be changed, providing for: a fairer balance of burdens between parties; broader legal standing to allow for actions such as multiple claimants; enhanced powers to make decisions enforceable; simplified and accelerated procedures for cases of particular interest (strategically or for an individual). Member States should, to enhance support, adapt information and procedures to the various needs of complainants, be it, for instance, related to disabilities or language skills. The support element also includes a fundamental rights context: greater awareness is not only needed among the public but also among judges.³²

- In asylum cases, Member States' authorities should better inform potential asylum seekers about the relevant procedures so that these become truly accessible. This includes the provision of information in the language of an applicant, reasonable time limits and effective legal assistance.³³
- Member States should acknowledge the particular needs and vulnerabilities of children involved in judicial proceedings and avoid secondary victimisation. Preliminary FRA research findings on child participation in civil and criminal proceedings show that awareness among legal professionals on the rights of the child is increasing, but the requirements relating to training of judicial and law enforcement authorities, and practice on the ground, vary greatly by Member State. Supporting and encouraging the development of training activities for judicial authorities (judges, prosecutors) and law enforcement authorities (police officers) dealing with children should be a priority.
- Migrant women employed in the domestic work sector are at heightened risk of exploitation and abuse. They may be forced to provide sex in return for housing and food. A particular concern in the context of domestic violence is that the residence permit of the victim may be dependent on the perpetrator, namely the employer, which further discourages the victims from reporting crimes. Member States should find ways to ensure victims' security of residence by delinking their residence permits from the work contract with the perpetrator.³⁴

Privacy and data protection

The protection of personal data is recognised as a fundamental right in the Charter (Article 8). EU citizens' personal data are processed in almost every Union sectoral policy; often these data are stored and analysed on a mass scale. It is therefore imperative that personal data are afforded a high level of protection. The confidence that EU citizens have in the level of effectiveness of protection of their personal data also affects their willingness and readiness to share these data for the purposes of fostering public policies or commercial ventures. FRA research has focused especially on the role of Data Protection Authorities (DPAs). Based on this research the following should be taken into consideration:

- Taking the CJEU's case law as a starting point,³⁵ EU legislation should strengthen the independence of DPAs (see also above). DPAs should have enhanced powers and competences, buttressed by adequate financial and human resources, including diverse and

³² FRA (2012), *Access to justice in cases of discrimination in the EU: steps to further equality*, Luxembourg, Publications Office of the European Union, available at: <http://fra.europa.eu/sites/default/files/fra-2012-access-to-justice-social.pdf>.

³³ FRA (2010), *Access to effective remedies: the asylum-seeker perspective*, Luxembourg, Publications Office of the European Union, available at: http://fra.europa.eu/sites/default/files/fra_uploads/1691-report-access-remedies_EN.pdf.

³⁴ See e.g. FRA (2011), *Migrants in an irregular situation employed in domestic work: Fundamental rights challenges for the European Union and its Member States*, Luxembourg, Publications Office of the European Union, available at: <http://fra.europa.eu/en/publication/2012/migrants-irregular-situation-employed-domestic-work-fundamental-rights-challenges>.

³⁵ CJEU, *Commission v. Germany*, C-518/07, 9 March 2010 and *Commission v. Austria*, C-614/10, 16 October 2012.

qualified professionals, such as trained information technology specialists and qualified lawyers.³⁶

- Enhanced data protection could include safeguards for effective enforcement of decisions of DPAs and reasonable length of procedures. This would enable DPAs to remain the preferred point of access for remedying data protection violations, while streamlining the number of existing avenues for a remedy and decreasing overall costs, delays and formalities.³⁷
- The EU should ensure that civil society organisations and independent bodies are in a position to assist victims in seeking redress in the area of data protection, which requires that these organisations and bodies are sufficiently funded. To enhance the ability of victims to bring claims, the EU should consider further relaxing rules on legal standing in procedures concerning data protection violations (see also more generally on broadened legal standing above). Enabling organisations to lodge a complaint before a supervisory authority or a court, while acting in the public interest, would open the door to much wider – and needed – collective action.

Revelations in 2013 on mass electronic surveillance programmes not only by the United States but also by governments of EU Member States have undermined EU citizens' trust in the protection of their fundamental rights.³⁸ The existence of threats to national security must be carefully balanced with the right to privacy. A resolution adopted by the UN General Assembly on 18 December 2013 call for human rights to prevail and be protected online and offline. It recognises for the first time an international right to privacy in the digital age.³⁹ To keep pace with these developments, action is needed:

- The legal framework for data protection in the EU needs to be strengthened, in particular independent judicial control and oversight of surveillance as well as effective access to justice enabling appeal of consequences of surveillance, such as being denied visa.
- Greater democratic control of intelligence services could also be envisaged.
- In light of available technologies the EU needs to establish a new balance between security and privacy, both within the EU and in its partnerships.

2. Criminal law

Address the need for legal aid and accommodate the needs associated with the creation of a European Public Prosecutor's Office

The Stockholm Programme initiated two main roadmaps: on criminal procedures and on the rights of victims of crime. Taken together, these two set a solid EU standard. In particular, in cross-border justice, they ensure that language is less of an obstacle in criminal procedures by introducing of minimum standards on interpretation and translation. They also ensure that rights are known and given structure, that particularly vulnerable groups receive extra attention, and that access to justice is

³⁶ FRA (2014 forthcoming), *Access to data protection remedies in the European Union*, Luxembourg, Publications Office of the European Union.

³⁷ FRA (2013), *Opinion 02/2012 on the proposed EU data protection reform package*, 1 October 2012, available at: <http://fra.europa.eu/sites/default/files/fra-opinion-data-protection-oct-2012.pdf>.

³⁸ European Parliament (2013), National programmes for mass surveillance of personal data in EU Member States and their compatibility with EU law, available at: [www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493032/IPOL-LIBE_ET\(2013\)493032_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493032/IPOL-LIBE_ET(2013)493032_EN.pdf). See also Council of Europe, *Declaration of the Committee of Ministers on Risks to Fundamental Rights stemming from Digital Tracking and other Surveillance Technologies*, 11 June 2013, available at: [wcd.coe.int/ViewDoc.jsp?Ref=Decl\(11.06.2013\)&Language=lanEnglish&Ver=original&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383](http://wcd.coe.int/ViewDoc.jsp?Ref=Decl(11.06.2013)&Language=lanEnglish&Ver=original&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383).

³⁹ See <http://www.un.org/News/Press/docs/2013/ga11475.doc.htm>.

ensured through legal aid. The Lisbon Treaty also introduced the possibility of establishing a European Public Prosecutor's Office.

- Measures on legal aid need to be strengthened to improve access to justice, especially in view of the economic crisis and fiscal consolidation measures some Member States have taken, where unemployment and the risk of poverty increase. More efficient legal aid is the required response – including ensuring a horizontal approach across all EU Member States. An example can be drawn from the Council directive to improve access to justice in cross-border disputes by establishing common rules relating to legal aid for such disputes.⁴⁰ The CJEU recently provided a related interpretation of Article 47 which stressed that “the requirement that the cost should be ‘not prohibitively expensive’ pertains [...] to the observance of the right to an effective remedy [...] and to the principle of effectiveness [...]”⁴¹ Further action on legal aid is needed coupled with genuine transposition of the legislative measures of the criminal procedure roadmap.
- The eventual establishment of an European Public Prosecutor's Office will also have to be seen in light of, for instance, Article 47 of the Charter, which provides for the right to an effective remedy and a fair trial. Should the crimes addressed by a European Public Prosecutor's Office have clear victims, they would have the right to challenge a prosecution that is discontinued. Such a right is not currently provided for by law in all EU Member States. Similar problems may also appear in relation to third parties, such as when it comes to the confiscation of property that may end up belonging to someone other than the suspect or accused person, such as a family member. Here as well, in relation to the rights of third parties, action at EU level would be needed.

Enhance the rights of victims and improve the services at their disposal

The second roadmap initiated under the Stockholm Programme enhances the rights of victims of crime with legislative minimum standards, practical guidance on how to make law a reality in practice and how to protect particularly vulnerable groups.

- On the rights of victims of crime, the 2012 Victims' Directive, which Member States must transpose by 16 November 2015, requires EU Member States to ensure a range of rights, including access to victim support services. Preliminary findings of a major FRA research project initiated in 2011 on victim support services shows that considerable work is needed in many Member States to be in compliance with this legislation. At the same time, a number of promising practices exist that call for a proper exchange of knowledge and experience amongst Member States.⁴²
- EU action is also needed in relation to the rights of victims of crime of particular groups. Such action should ensure that existing legislation is applied in practice. It should also enhance support for particularly vulnerable groups; including victims of crime committed with a discriminatory motive ('hate crime'), women who are victims of violence and victims of labour exploitation. These groups can be of particular relevance in cross-border justice settings. A further issue for the rights of victims of crime is the importance of the police as

⁴⁰ In its Article 3 the Directive establishes that natural persons involved in a dispute covered by the Directive shall be entitled to legal aid that ensures their “effective access to justice”. In this context legal aid is considered appropriate when it guarantees “pre-litigation advice with a view to reaching a settlement prior to bringing legal proceedings” but also “legal assistance and representation in court, and exemption from, or assistance with, the cost of proceedings of the recipient, including the costs referred to in Article 7 [costs for interpretation, translation, travel] and the fees to persons mandated by the court to perform acts during the proceedings.” See OJ L 26 of 31 January 2003, p. 41.

⁴¹ CJEU, C-260/11, *Edwards*, 11 April 2013, para. 33.

⁴² See <http://fra.europa.eu/en/project/2012/victim-support-services-eu-overview-and-assessment-victims-rights-practice>.

gate-keepers to the criminal justice system. Here the EU and the Member States should identify appropriate responses to enhance recognition of the rights afforded victims of crime in line with the Victims' Roadmap.

Given the scale of violence against women reported in a FRA survey, the EU's post-Stockholm Programme landscape in the field of justice and home affairs should ensure that violence against women is acknowledged and addressed as a fundamental rights abuse within the framework of the EU's responses to crime and criminal victimisation. The survey, which is based on interviews with 42,000 women across the EU and whose results will be launched in March 2014, showed that women experience a range of violence in different settings, many of which, such as stalking and cyber-harassment, are of a cross-border nature. Encouragingly, under the package of proposals adopted by the Commission with respect to victims of crime, a Regulation was included on mutual recognition of protection measures – which should be of benefit to victims of domestic violence in cross-border cases, and offers an example of where action can be taken.

- The current focus on specific forms of violence against women, such as female genital mutilation, forced marriages and trafficking, which disproportionately affect certain groups, could be complemented by exploring other areas where action to address violence against women in general could be enhanced. The EU Victims' Directive applies to all crime victims and makes reference specifically to victims of gender-based violence alongside other vulnerable victims. It provides a solid base on which to build targeted responses, at the Member State level, to meet the needs of women as victims of violence with respect to victim support and criminal justice interventions. As part of the Commission's review of the implementation of the Directive, a component could assess whether the Directive actually meets in practice the needs and rights of women who are victims of violence, as well as other vulnerable groups.

Enhance the fight against hate crime and the protection of the victims of such crimes

A particular group of victims of crime are those subject to hate crime. FRA published two studies on hate crime in 2012.⁴³ FRA research shows that more than one-quarter of respondents from some groups considered that they had been the victim of 'racially motivated' assault or threat, or serious harassment, so-called 'in-person crime', in the last 12 months.⁴⁴

- The scope of the Framework Decision on Racism and Xenophobia (2008/913/JHA) should be enhanced.⁴⁵ Moreover, awareness raising should be considerably enhanced and support services strengthened. Member States should make sure that the police, as a central actor, are aware, capable, and have sufficient incentives to deal effectively with victims of hate crime. They need to be able to identify victims as such, guide them to appropriate support, and initiate a criminal investigation that takes the hate element into consideration.

⁴³ FRA (2012) *EU-MIDIS Data in Focus 6: Minorities as victims of crime*, Luxembourg, Publications Office of the European Union, available at: http://fra.europa.eu/sites/default/files/fra-2012-eu-midis-dif6_0.pdf and FRA (2012) *Making hate crime visible in the European Union: acknowledging victims' rights*, Luxembourg, Publications Office of the European Union, available at: http://fra.europa.eu/sites/default/files/fra-2012_hate-crime.pdf.

⁴⁴ FRA (2012) *EU-MIDIS Data in Focus 6: Minorities as victims of crime*, Luxembourg, Publications Office of the European Union, p. 3, available at: <http://fra.europa.eu/en/publication/2012/eu-midis-data-focus-report-6-minorities-victims-crime>.

⁴⁵ See FRA (2013), *Opinion 02/2013 on the Framework Decision on Racism and Xenophobia – with special attention to the rights of victims of crime*, of 15 October 2013, available at: http://fra.europa.eu/sites/default/files/fra-opinion-2-2013-framework-decision-racism-xenophobia_en.pdf; see also the Council Conclusions on combating hate crime in the European Union, 6 December 2013, available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/139949.pdf.

- Given its intrinsically cross-border nature, EU action would be beneficial in relation to cyber hate. Consideration should also be given to approximate legislation on negationism and reviving of totalitarian ideologies given their strong cross-border effect.

3. Equality and non-discrimination

The Action Plan implementing the Stockholm Programme highlighted that together with the Europe 2020 growth strategy it was a “key element of the EU’s response to the global long-term challenges and a contribution to strengthening and developing the European model of social market economy into the 21st century.” The EU Demography Report 2010⁴⁶ continued to depict an ageing population but also an increasingly diverse and mobile population. Greater numbers of EU citizens were exercising their right to free movement and a not insignificant number of non-EU nationals (5.5 million between 2001 and 2008) acquired EU Member State citizenship. Foreign-born EU citizens or EU citizens with a foreign background accounted for 12.7 % of EU residents in 2008 and are projected to double to 25 % by 2060. In addition, a new group of mobile, mostly young and well-educated Europeans were taking advantage of the right to free movement for education and employment.

The Stockholm Programme’s Europe of rights sets out to be an area in which citizens and their family members might exercise in full the right to free movement. The Europe of rights-area must also be one in which racism and xenophobia are tackled, diversity is respected and the most vulnerable groups of people, such as children, minorities such as Roma and victims of violence, are protected. EU citizens in this area can also participate in the democratic life of the EU through access to and engagement in decision-making processes and responsive administrations.

Europe 2020 growth strategy set five ambitious objectives – on employment, innovation, education, social inclusion and climate/energy – to be reached by 2020. Establishing a Europe of rights will be key to meeting these objectives. In order to meet these objectives, however, more action will be required within the Union to combat discrimination and maintain or introduce positive action, raise sufficient awareness to support the equality directives and examine ways to improve access to justice through institutional and procedural reforms.⁴⁷

- Given the demographic data, the EU can anticipate greater diversity in its labour markets and its populations. Issues around social cohesion may become more prominent if policies fail to account for the changes taking place in EU societies. These changes should be seen as part of the natural transformation of the EU to strengthen its ability to compete globally.
- Greater awareness, and the effective implementation, of laws in particular on equal treatment and non-discrimination in labour markets, in access to education, in access to goods and services with regard to EU nationals in other EU countries, with special attention on young mobile EU citizens; Roma; and EU citizens with a foreign background.

FRA research has shown that there are persisting levels of discrimination in the areas of employment, housing, healthcare, education, social services and access to goods and services. The current protection against discrimination varies, however, by ground and by area. This horizontal asymmetry in protection is complemented by different levels of protection afforded by EU and national law.

⁴⁶ Demography Report 2010 (2010), *Older, more numerous and diverse Europeans*, European Commission, March 2011

⁴⁷ See, e.g., *Opinion of the European Union Agency for Fundamental Rights on the situation of equality in the European Union 10 years on from initial implementation of the equality directives*, FRA Opinion 01/2013, 1 October 2013, European Union Agency for Fundamental Rights, available at: http://fra.europa.eu/sites/default/files/fra-2013-opinion-eu-equality-directives_en.pdf.

Many EU Member States have already gone beyond current EU obligations and provided protection against discrimination in additional areas and/or on additional grounds, making the asymmetry of protection within the EU not only ‘horizontal’ but also ‘vertical’ in nature.

- One of the ambitions of the Horizontal Directive proposed in 2008 is to establish a framework for a uniform minimum level of protection which would align protection from discrimination both ‘vertically’ and ‘horizontally’. Such an alignment would be a welcome development.

Using scientific data in addressing discrimination of Roma

Data from surveys undertaken jointly by the FRA, the European Commission, the United Nations Development Programme and the World Bank show that the share of Roma facing discrimination and social exclusion across the EU remains unacceptably high. The situation of Roma is on average worse than the situation of non-Roma living in close proximity to Roma in the areas of employment, education, housing and health. Only 15 % of young Roma adults surveyed have completed upper-secondary general education, compared with more than 70 % of the majority population. Of the Roma surveyed, one-third are unemployed, 20 % are not covered by health insurance, and 90 % are living below the poverty line. About half reported that they had experienced discrimination because of their ethnic background in the 12 months preceding the survey. The Council recommendation on effective Roma integration measures, adopted on 10 December 2013, provides guidance to Member States on enhancing the effectiveness of their measures to achieve Roma integration. It also aims to strengthen the implementation of their national Roma integration strategies or integrated sets of policy measures within broader social inclusion policies which are designed to improve the situation of Roma and to close any gaps between Roma and the general population.⁴⁸

- In line with the Council recommendation, Member States should make use of core indicators or methods of empirical social research or data collection for monitoring and evaluating progress on a regular basis, particularly at the local level. This would enable efficient reporting on the situation of Roma in the Member States. In this regard, Member States are encouraged to use FRA expertise and join the relevant working group facilitated by the FRA, as subgroup of the Commission’s National Contact Points on Roma Integration.

Enhance protection against discrimination based on gender identity and foster the freedom of movement for same-sex couples

Despite EU legislation protecting Lesbian, Gay, Bisexual and Transgender (LGBT) persons from discrimination in employment and training, one in five respondents in FRA’s EU LGBT survey who had been employed in the year preceding the survey had felt discriminated against at work or when looking for a job. The figure was significantly higher for transgender persons. Of those respondents who had felt discriminated in any area, such as employment, education or health, 87 % did not report this to any authority. Almost half of the respondents (45 %) either said that there was no legislation protecting persons from discrimination on the ground of sexual orientation in employment or that they did not know about any such protection.

- Steps should be taken at both national and EU level to improve awareness of existing anti-discrimination legislation both among the general population and, in particular, among LGBT people across the EU. The improvement of rights awareness would enhance access to justice and encourage persons to lodge complaints and report discrimination. National equality bodies have a particularly important role to play in this regard and Member States should ensure that they are adequately resourced to fulfil the function entrusted to them.

⁴⁸ Available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/lsa/139979.pdf.

- Given that the FRA survey reveals high levels of discrimination in areas currently not covered by EU law, particularly in education, the adoption of the Horizontal Directive proposed in 2008 would increase protection and contribute to the promotion of equality.
- Gender identity should become a protected ground under relevant EU legislation, like the Gender Equality Directive on Goods and Services, so that an unjustified differentiation based on gender identity does not fall in a legal grey zone.⁴⁹ In the context of employment, the current legal protection accorded by EU law to those who intend, are undergoing or have undergone gender reassignment, should be extended to all transgender persons.

The FRA LGBT survey respondents also expressed problems with regard to the recognition of their relationship when exercising their freedom of movement within the EU. Based on a small sample, 30 % of respondents in a legally recognised same-sex partnership said that they had been denied or restricted access to benefits or services when living in another EU Member State because they were in a same-sex rather than a different-sex civil partnership or marriage. On 12 December 2013, the CJEU held that in Member States where gay and lesbian couples cannot marry, they must be given the same benefits as married couples if they enter into civil partnerships.⁵⁰

- The EU and its Member States should ensure that differences in national legislation with regard to the recognition of same-sex partnerships or marriages do not restrict freedom of movement within the EU.

Implement the ratification of the UN Convention on the Rights of Persons with Disabilities

Soon after the initiation of the Stockholm Programme, the UN Convention on the Rights of Persons with Disabilities (CRPD) entered into force for the EU.⁵¹ This marks the first time that the EU has acceded to a legally binding international human rights instrument, taking on the ensuing responsibilities for implementation within its sphere of competence. FRA research released in 2012 indicates that persons with disabilities face obstacles to entering and retaining paid employment, entrenching exclusion and dependence.⁵² FRA research also shows that in nearly all EU Member States, legal frameworks allow for the legal capacity of persons with intellectual or psychosocial disabilities to be totally or partially restricted.⁵³ This contrasts with the view of the UN CRPD monitoring body that the existence of an impairment must not be the basis for the denial of legal capacity.⁵⁴ Preliminary results of FRA research to be published in 2014 also indicate that persons with disabilities continue to face a range of legal and practical barriers to political participation.⁵⁵

- The UN CRPD is the only legally binding core international human rights instrument that the EU has ratified. The EU should use all the means at its disposal to promote the conformity of Member State legislation with the convention, as proposed in the European Disability

⁴⁹ Whereas the trend goes towards the recognition of gender identity as a protected ground, there are still a number of Member States where, for instance, discrimination on grounds of gender reassignment has not been explicitly dealt with in legislation or in case law, resulting in a situation of legal uncertainty as to the precise protection of transsexuals and transgender persons from discrimination. See FRA (2010), *Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity*, p. 21.

⁵⁰ CJEU, C-267/12, *Frédéric Hay v Crédit agricole*, 12 December 2013.

⁵¹ The EU ratified the CRPD on 23 December 2010, see: www.un.org/disabilities/countries.asp?id=166#E.

⁵² FRA (2012) *Choice and control: the right to independent living*, Luxembourg, Publications Office, available at: <http://fra.europa.eu/en/publication/2012/choice-and-control-right-independent-living>.

⁵³ FRA (2013) *Legal capacity of persons with intellectual disabilities and persons with mental health problems*, Luxembourg, Publications Office of the European Union, available at: <http://fra.europa.eu/en/publication/2013/legal-capacity-persons-intellectual-disabilities-and-persons-mental-health-problems>.

⁵⁴ CRPD Committee (2013), *Draft general comment on Article 12 of the Convention – Equal recognition before the law*, available at: www.ohchr.org/Documents/HRBodies/CRPD/GC/DGCArticle12.doc.

⁵⁵ FRA (2014 forthcoming) *Indicators on the political participation of persons with disabilities*, Luxembourg, Publications Office of the European Union.

Strategy 2010–2020.⁵⁶ It should also make sure that EU legislation and policies are in full compliance with the CRPD. In addition, it is important to ensure that the members of “the framework” established under Article 33 (2) of the CRPD (the European Parliament, European Commission, European Ombudsman, FRA and European Disability Forum) are appropriately resourced to fulfil the functions defined in the Commission’s proposal.

- The Council and the Commission should consider the duties flowing from the ratification of the CRPD. FRA could assist in this process, for example by contributing to a review of the Commission’s impact assessment guidelines. These guidelines should include, in addition to compatibility with the EU Charter of Fundamental Rights and the social impact of policy options, rights enshrined in the CRPD more concretely, as they are more far reaching than the integration of persons with disabilities mentioned in the Annex to the impact assessment guidelines.

Considerations for the area of Home Affairs

1. Visa and borders

Consider the impact of increased use of modern information technologies

Visa and border management policies are increasingly making use of modern technologies. Biometric data is stored in passports – found to be lawful by the CJEU –⁵⁷ and Schengen visas. The EU has created a large database storing detailed information, including fingerprints of visa applicants. A second database (Entry-Exit System) is planned and will store similar information when third-country nationals from visa-exempted countries cross the Schengen border. Satellite imagery and unmanned aerial vehicles (drones) are likely to be increasingly used for sea border surveillance. Some of these technologies are very costly and take away EU resources from other policy fields. Their added value in terms of security as well as the facilitation of travel needs, therefore, to be clear and explained to citizens.

Little analysis exists on the impact of modern technologies on fundamental rights, be it positive (for example, swifter border checks) or negative (misuse of personal information stored in large information technology systems). For this reason, FRA will research the impact of the large-scale collection, use and storage of biometric data.

- New instruments, tools, and policies by EU institutions and Member States should not be developed in the absence of reliable information on ethical considerations and, more specifically, on their impact on fundamental rights. FRA research results, expected for early 2016, should inform relevant policy discussions in this field.
- The fundamental rights potential of Eurosur, the EU border surveillance system, should be made visible by a clear commitment and action to use it for the protection and saving of lives of migrants at sea.

Create legal ways to access Europe for persons in need of protection

Migrants who put their lives at risk by crossing the sea in unseaworthy boats to reach the shores of southern Europe highlight an alarming and unresolved gap in the EU’s protection of core rights of

⁵⁶ European Commission (2010), *European Disability Strategy 2010–2020: A renewed commitment to a Barrier-free Europe*, COM(2010) 636 final, Brussels, 15 November 2010.

⁵⁷ CJEU, Case C-291/12, *Michael Schwarz v Stadt Bochum*, 17 October 2013.

individuals. In March 2013, FRA issued a report about those people who risk their lives crossing by sea to the EU to escape war or persecution or pursue a dream.⁵⁸

While action to combat smuggling and trafficking in human beings is being taken, both within the EU as well as with third countries, Europe has so far done little to offer alternative ways to seek safety for those who flee persecution or serious harm.

- The EU should initiate a process leading to a joint commitment by all Mediterranean coastal and other interested States to address unsafe migration by sea. Such commitment should also include a component of legal access to the EU, through, for instance, humanitarian visas, potentially focusing on those who have close family members living in the EU.

Ensure fundamental rights safeguards for operational cooperation with third countries

The contemporary concept of border management extends beyond activities at the physical border of a country. It requires cooperation with third countries. Cooperation in the fight against smuggling in human beings is also encouraged by international law, such as in Article 7 of the Protocol against Smuggling of Migrants by Land, Sea and Air which supplements the UN Convention against Transnational Organized Crime.⁵⁹

Cooperation can include a variety of measures, such as the exchange of intelligence with countries of origin or transit, the posting of liaison officers or capacity-building activities in third countries. It can also extend to joint operations. These do not, however, discharge EU Member State officials from their duty to respect fundamental rights.

- Joint operations with third countries must be conditional on full respect for fundamental rights. Tools should be developed to ensure that this happens in practice. Operational plans and other documents guiding joint operations or patrols with third countries must be drafted in such a way as to mitigate as much as possible the risk of fundamental rights violations. In particular, any guidelines drafted should have clear provisions on the use of force, the prohibition of torture, inhuman or degrading treatment or punishment and respect for the principle of *non-refoulement*.

2. Asylum

Review the Dublin system

In spite of the massive legislative work done on asylum at the EU level and the support given to national asylum systems, including through EU funding, the chances an applicant for international protection has for obtaining such protection depend greatly on the Member State in which he or she applies.⁶⁰ According to Eurostat data extracted on 6 December 2013, for example, in 2012 at first instance some 93 % of Afghan applicants were found to be in need of protection in Italy, compared to

⁵⁸ FRA (2013), *Fundamental rights at Europe's southern sea borders*, Luxembourg, Publications Office of the European Union, available at: <http://fra.europa.eu/en/publication/2013/fundamental-rights-europes-southern-sea-borders>.

⁵⁹ Protocol entered into force in 2004. All EU Member States have signed and 27, excluding Ireland, are also state parties, as is the EU. It is available at: <http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>.

⁶⁰ Both the ECtHR and the CJEU have held that systemic flaws in the asylum procedure and reception conditions for asylum seekers in the responsible Member State resulted in inhuman and degrading treatment contrary to Article 3 of the ECHR or Article 4 of the EU Charter of Fundamental Rights, see ECtHR, *M.S.S. v. Belgium and Greece* [GC], No. 30696/09, 21 January 2011; CJEU, *Joined Cases C-411/10 and C-493/10, N.S. v. Secretary of State for the Home Department and M.E. and Others v. Refugee Applications Commissioner & Minister for Justice, Equality and Law Reform*, 21 December 2011.

only 17 % in Poland. Similarly, 23 % of Somalis were given asylum in France, compared to some 70 % in Germany. This illustrates that there is still a long way to go to create the level playing field on which the Dublin system is premised.

- The Dublin Regulation (Regulation (EU) No. 604/2013), which determines where a person's application should be examined, is based on the assumption that all EU Member States offer a comparable chance of providing protection. In 2017, the Dublin system will have been in force for 20 years. Before that date, a comprehensive evaluation of the benefits and costs, including in terms of fundamental rights implications, should be carried out. The report which the Commission is required to furnish in 2016 under Article 46 of the Regulation provides a unique opportunity to do this on a fully-informed basis. Based on it, a decision should be taken on the future of the Dublin system as a whole.

Introduce EU processing of asylum claims

Decisions on asylum applications are taken individually by EU Member States, based on national asylum procedures which must respect common EU standards. While Member States can support each other – either individually or through the European Asylum Support Office – such support cannot go so far as taking decisions on behalf of other Member States. It is limited to issues such as the provision of country-of-origin information, interpretation and translation services, training and sharing of good practices.

In other fields, however, cooperation between Member States is much more developed. Under the Schengen Regulation (Regulation (EC) No. 863/2007) border guards may carry out border surveillance activities at the external EU border in another state. Where necessary and provided certain conditions are fulfilled, they may use force in accordance with national law of the host Member State. Article 8 of the Visa Code allows an EU Member State representation in a third country to issue a Schengen visa for another EU Member State. A Member State may also remove third-country nationals from the EU who have been the subject of a removal order issued by another Member State.

In the long term stronger cooperation among EU Member States in the adjudication of asylum claims should be achieved. If asylum claims were to be adjudicated and reviewed by an EU entity, this would make it less relevant in which Member State an application is lodged, as the chances to receive protection would be comparable. Moreover, the processing of asylum claims at the EU level would address the problems currently encountered in the Central Mediterranean: the absence of clear disembarkation rules for migrants rescued or intercepted at high seas and the different interpretations of what is the nearest place of safety has led to delays in disembarkation, at times keeping migrants stranded for days on board the ship that rescued them.

- The EU should consider the possibility of replacing in the long-term national processing of requests for international protection with processing by an EU entity. In the medium term, pilot projects should be carried out to see how existing legal and practical obstacles could be overcome.
- At the same time, and in light of the limited applicability of the European Agreement on Transfer of Responsibility for Refugees (Council of Europe, 1980), the EU and its Member States should consider establishing a mechanism for mutual recognition of positive asylum decisions, including possibly by a wider ratification of the 1980 Council of Europe Agreement.

Create more resettlement opportunities

Resettlement of refugees from first countries of asylum in which their safety is not ensured or where refugees remain in legal limbo for protracted periods of time is an important tool of international solidarity. The UN High Commissioner for Refugees (UNHCR) has called upon states worldwide to increase the number of places for resettled refugees. In Europe, an NGO-led campaign has proposed establishing 20,000 resettlement places in the EU by 2020. In 2012, according to the UNHCR Global Resettlement Statistical Report 2012, the 28 EU Member States together resettled in total 4,125

refugees compared to some 50,000 persons resettled to the US, 10,000 to Australia and 6,200 to Canada. Out of the 4,125 resettled to the EU, over 2,500 persons were resettled to Sweden and Denmark, with only some 1,600 persons resettled to the rest of the EU.

- Europe should commit itself to global solidarity. Europe should offer more resettlement opportunities, to be implemented in cooperation with the UNHCR.

3. Immigration and return

Use detention only when necessary and respect human dignity

Detention of a person constitutes a major interference with the right to liberty. Any deprivation of liberty must therefore respect the safeguards which have been established to prevent unlawful and arbitrary detention. This is also the case when detention is resorted to in order to facilitate the removal of persons. Thus, while pre-removal detention is not in itself a violation of fundamental rights, it can become so. This would, for instance, be the case when the grounds justifying detention are not laid down in national legislation in a clear and exhaustive manner, or when the detention was not carried out in compliance with the procedural or substantive rules European and national law stipulate.

Detention of persons in return procedures is a widespread phenomenon. Although alternatives to detention exist in most EU Member States, these are still not widely used.

Conditions in detention facilities used to hold persons in return procedures must respect certain minimum standards, including those developed by the Council of Europe's Committee for the Prevention of Torture and the Committee of Ministers of the Council of Europe.⁶¹ Conditions in places used to hold migrants vary substantially across the EU. In the past, FRA saw that in some locations persons are kept in inhuman and degrading conditions as illustrated in its 2011 report on the fundamental rights crisis at the Greek-Turkish land border. Reinforced attention should therefore be given to ensuring that persons in return proceedings are only detained when necessary and in facilities which are not inhuman or degrading.

- The Council of Europe has started the development of standards for immigration detention, based on already existing standards for prisoners. EU Member States should support this exercise. When standards have been developed, EU funding could support the implementation of these standards in practice.

Remember the existence of migrants in an irregular situation when developing EU policies

Except for specific categories of persons, such as asylum seekers, it is the prerogative of states to decide who can enter a country and who cannot. Once an individual is in the country, however, he or she is entitled to enjoy a set of fundamental rights granted to all human beings irrespective of their migration status. As a 2011 FRA report demonstrates, access to basic rights, such as education or healthcare, by migrants in an irregular situation differs significantly among EU Member States in law and practice, leading to situations where children cannot go to school and sick persons cannot receive medical care. Migrants in an irregular situation will rarely report a crime to the police, as a victim or as a witness, as they are afraid of being detected and returned. This includes victims of severe forms of labour exploitation. Access to justice is barred, leading to perpetrator impunity.

Policies in the area of immigration, return, and victims' protection have paid little attention to the existence of migrants in an irregular situation and to the fact that practical obstacles may prevent their access even to the most basic of rights.

⁶¹ See Guidelines on forced return adopted by the Committee of Ministers of the Council of Europe on 4 May 2005, at the 925th Meeting of the Ministers' Deputies.

- The existence of migrants in an irregular situation should be acknowledged when EU policies on immigration, return as well as victim protection are developed and implemented. Such policies should be directed towards removing legal and practical obstacles that may prevent them from enjoying their fundamental rights.
- Legal labour migration schemes should be developed to fill labour demand needs in Member States. This would contribute to reducing the need for irregular work and thus the risk of exploitation and other fundamental rights abuses triggered by the migrants' irregular status.

Avoid leaving persons who cannot be removed in a legal limbo

A particular challenge concerns persons who cannot be returned and are not granted a right to stay. Impediments for removal may be based on several grounds linked to legal or humanitarian considerations, practical obstacles or policy choice. EU Member States have adopted different policies to deal with this phenomenon. In some cases, temporary residence permits are issued, in others, stay is authorised on the basis of a formal toleration and, in a third group of cases, the presence of persons who are not removed is simply tolerated *de facto*. The level of security of residence usually determines the degree to which non-removed persons have access to fundamental rights. Non-removed persons may remain in a situation of legal limbo, often for years.

- EU institutions and Member States should take steps to avoid situations where persons who are not removed remain in legal limbo without access to basic rights